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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. AARON W. THURMAN, Defendant and Appellant.	D073632 (Super. Ct. No. SCN371667)

APPEAL from an order of the Superior Court of San Diego County, Sim Von Kalinowski, Judge. Affirmed.

Bruce L. Kotler, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal and Andrew Mestman, Deputy Attorneys General, for Plaintiff and Respondent.

Aaron Wesley Thurman was convicted by a jury of first-degree residential burglary (Pen. Code[1] §§ 459, 460; count 1); grand theft (§§ 484, 487, subd. (a); count 2); receiving stolen property (§ 496, subd. (a); count 3); and shoplifting (§ 459.5; count 4). Thurman admitted a prison prior (§ 667.5, subd. (b)).

The court dismissed count 3 and sentenced Thurman to the middle term of four years for burglary and one year for the prison prior.

Thurman appeals contending the court erred in giving CALCRIM No. 1702 regarding the liability of aiders and abettors for burglary. Thurman did not object to the instruction at trial, did not contend it was confusing and did not request any clarifying language. He now contends the instruction is misleading under the facts of this case and that counsel was ineffective for not raising the issues in the trial court.

CALCRIM No. 1702 is a correct statement of law and when reviewed in light of all the instructions is not confusing nor is there any likelihood the jurors would be confused. We will find no instructional error and further find Thurman has not met his burden to show defense counsel was ineffective. We will affirm the judgment.

FACTS AND PROCEDURAL BAKGROUND

Thurman does not challenge the admissibility or the sufficiency of the evidence to support his convictions. The issue on appeal is one of law. We will adopt the respondent's statement of facts as an accurate summary of the record to provide context for the discussion which follows.

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1 All further statutory references are to the Penal Code unless otherwise specified.

G.T. was a general contractor. He was hired to do construction and remodeling work at the San Marcos duplex of L.D., with whom he had worked before. G.T. hired Thurman to help work on the house. Work on the home began on August 17, 2016. Thurman, along with coworker C.M., worked on the house approximately 10 total days, finishing on August 31.[2] Occasionally, G.T.'s daughter would stop by the house. During the work on the house, Thurman and C.M. had no reason to enter the master bedroom, which was blocked and sealed off with plastic.

Around September 1, 2016, L.D. realized some cash was missing from a music box that was on a table next to her bed. She contacted G.T. and indicated that money was missing from her house. Later, she realized more money and some of her jewelry, including three rings that she kept in the nightstand next to her bed, were also missing. Again, she contacted G.T. and told him she was also missing jewelry. G.T. told her to contact the police, which she did. Believing Thurman was involved, G.T. contacted both Thurman and C.M. and told them if they returned the items he would not get the police involved.

On September 2, 2016, a deputy sheriff, in response to a call regarding the theft, spoked to L.D. who indicated some of her items were missing during a remodel of her home. According to L.D., she had hired G.T. Construction and work was performed from August 17 until August 30, 2016. A few days after the project was completed, she discovered that cash and jewelry were missing from her home. The cash had been taken

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[2] C.M., however, testified the two worked together for "[p]ossibly three days" and there were a few days where Thurman worked alone.

from her bedroom. L.D. provided the deputy with a description of the jewelry that was taken. A partial fingerprint obtained from a jewelry box was submitted as potential evidence, however, a subsequent analysis determined that the print had no value.

Thurman and G.T. then engaged in a series of text messages about L.D.'s property. After G.T. told Thurman he would give Thurman $500 upon return of L.D.'s property, Thurman texted, "looking into it." Thurman then sought reassurances that he would receive $500 after he retrieved items from a pawn shop.

Thurman then indicated he needed an additional $483 on top of the $500. Thurman told G.T. to head to El Camino Real and Mission Avenue and requested that he let him know when he was close and at that time he would provide G.T. with the exact address of where to go. After G.T. determined that the Gems N' Loan pawnshop was in that area, G.T. contacted an officer with San Marcos Police Department and explained that he thought he knew where the jewelry was. The officer asked G.T. to "stall" Thurman while he checked into it. Thurman called G.T. to make sure he would still get his $500, even after G.T. had paid the pawn shop for the items.

An officer contacted the pawnshop and was told that Thurman had pawned items there on August 26. He then met L.D. at the pawn shop. She identified six items Thurman had pawned as belonging to her. Not all her items were there, however. Transaction receipts from the pawning of the jewelry listed Thurman's name. Thurman is also observed at the pawnshop in surveillance video obtained by police. G.T. paid $455 to get the items back for L.D. L.D. did not receive all of her property.

Later, in a phone call, Thurman told G.T. he was sorry, and said he committed the crime because G.T. was not paying him enough.

Thurman was arrested on April 15, 2017.

DISCUSSION

I

CALCRIM No. 1702

A. Background

The context in which the challenged jury instruction was used is a bit unusual. The prosecution proceeded through trial on the theory that Thurman was the perpetrator. It did not consider Thurman's co-worker as a participant in the offense. The co-worker testified for the prosecution but was evasive. His testimony apparently prompted at least one juror to become interested in accomplice liability. During deliberations the jury sent the following note to the court: "Would being an accomplice to residential burglary (some consider this a reasonable scenario) be considered as violating Burglary (Pen. Code section 459) in this case?"

After conferring with counsel, the court decided to give the jury the full set of aiding and abetting instruction and to allow the attorneys to argue such instruction to the jury. Defense counsel objected because the prosecution had not proceeded on any possible aiding and abetting theory. The court overruled the objection.

Thereafter, the court instructed the jury with CALCRIM Nos. 400, 401, and 1702 as follows:

> "A person may be guilty of a crime in two ways:

"1. He or she may have directly committed the crime. I'll call that person the perpetrator.

"2. He or she may have aided and abetted a perpetrator, who directly committed the crime. A person is guilty of a crime whether he or she committed it personally or aided and abetted the perpetrator. To prove that the defendant is guilty of a crime based on aiding and abetting that crime, the People must prove that:

"l. The perpetrator committed the crime;

"2. The defendant knew that the perpetrator intended to commit the crime;

"3. Before or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime;

"And 4. The defendant's words or conduct did in fact aid and abet the perpetrator's commission of the crime.

"Someone *aids and abets* a crime if he or she knows of the perpetrator's unlawful purpose and he or she specifically intends to, and does in fact, aid, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime.

"If all of these requirements are proved, the defendant does not need to actually have been present when the crime was committed to be guilty as an aider and abettor.

"If you conclude that defendant was present at the scene of the crime or failed to prevent the crime, you may consider that fact in determining whether the defendant was an aider and abettor. However, the fact that a person is present at the scene of a crime or fails to prevent the crime does not, by itself, make him or her an aider and abettor.

"Now, to be guilty of burglary as an aider and abettor, the defendant must have known of the perpetrator's unlawful purpose and must have formed the intent to aid, facilitate, promote, instigate, or encourage commission of the burglary before the perpetrator finally left the structure."

B. Legal Principles

Claims that jury instructions are legally incorrect are reviewed de novo. (*People v. Posey* (2004) 32 Cal.4th 193, 218.) Where there is a contention that an instruction is confusing we consider the argument in light of the totality of the instructions to determine if there is a reasonable likelihood that jurors might be confused or misled. (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088; *People v. Mayfield* (1997) 14 Cal.4th 668, 777.)

Section 31 defines who can be principals in the commission of a crime. They are persons who directly commit the crime or those who aid and abet in its commission. (*People v. Montoya* (1994) 7 Cal.4th 1027, 1038-1039 (*Montoya*).)

In order to be an aider and abettor one must, with knowledge of the purpose or intent of the perpetrator, encourage, instigate, promote or facilitate commission by act or advice. (*People v. Cooper* (1991) 53 Cal.3d 1158, 1164.) In order for the aider and abettor to be liable the person must form the intent to encourage or facilitate the crime prior to or during the commission of the crime. (*Montoya*, *supra*, 7 Cal.4th at p. 1146.)

In the case of aiding and abetting a burglary, the accomplice must act with the appropriate mental state before, the perpetrator leaves the burgled structure. (*Montoya, supra,* 7 Cal.4th at p. 1041.)

While trial courts have a duty to instruct on the applicable legal principles, the courts do not have a sua sponte duty to revise or improve an otherwise accurate statement of law, absent a request from counsel. (*People v. Lee* (2011) 51 Cal.4th 620, 638; *People v. Daya* (1994) 29 Cal.App.4th 697, 714.)

C. Analysis

In the *Montoya* case the supreme court undertook to determine the meaning of the term "during the commission of the crime" as it applies to aiding and abetting a burglary. The court rejected the argument that the aider and abettor had to form the intent to aid the perpetrator prior to the latter's entry into a building or room. Instead, the court held that the aider must form the mental state and assist the perpetrator prior to or during the offense. The court determined the "commission" of the burglary lasts from the entry until the perpetrator leaves the structure. CALCRIM No. 1702 adopts the high court's definition of the duration of commission of the crime of burglary.

Thurman argues on appeal that the language in the instruction that states the commission of the offense continues until departure of the perpetrator departs the structure is potentially misleading. Thurman argues the exact date of the burglary in this case is unknown, other that it had to happen while Thurman and his colleague were in the house, but before Thurman took the stolen property to a pawn shop. Thus, he contends the jurors could have been confused by the reference to the perpetrator departing from the structure. Of course, none of these arguments were made in the trial court and no proposed clarifying instructions were offered. As we have observed earlier, the trial court did not have a sua sponte duty to craft such "clarifying instructions."

We are obliged to consider Thurman's argument in light of the totality of the instructions. Burglary was defined as was the concept of aiding and abetting a burglary. Plainly the focus of the instructions as a total is that burglary is the entry into a building with the intent to commit theft. The burglary lasts, for the purpose of aiding and abetting,

until the perpetrator leaves the structure. We see nothing inherently confusing about the concepts discussed in the instructions. There is nothing here to cause us to believe there is a reasonable likelihood that any juror would be confused.

This case was not tried on an aiding and abetting theory. The People proceeded on the theory that Thurman was the perpetrator. There is virtually no evidence that his co-worker was the burglar. Thurman, on the other hand, pawned the stolen property, negotiated with his employer about possible return of the property and admitted to his employer that he committed the crime because the employer was not paying him enough. On this record there in no reasonable likelihood that there was juror confusion.

II

Ineffective Assistance of Counsel

Using a familiar strategy to avoid the impact of arguing issues on appeal that were never raised in the trial court, Thurman argues his trial counsel was ineffective for failing to raise these current challenges to CALCRIM No. 1702 in the trial court. He has not met his burden of proof.

A criminal defendant is entitled to competent representation as part of the Sixth Amendment right to counsel. On appeal, the burden is on the defendant to show his counsel's representation was constitutionally defective. In order to make such showing counsel must have acted in a manner that was objectively deficient in some respect. If such error occurred, the defendant must also show prejudice. Prejudice requires a showing that there is a reasonable likelihood there would have been a different outcome

in the absence of counsel's alleged error. (*Strickland v. Washington* (1984) 466 U.S. 668.) Thurman has not established either element of *Strickland*.

First, the instructions individually, and taken as a whole, are accurate statements of the law. There is no reasonable likelihood that an objection would have been successful, or that there is any reasonable basis to argue the challenged instruction was improper. Further, there is no conceivable prejudice to Thurman from the accurate instructions the jury received. It would be utter speculation to contend jurors could have been confused by the language of CALCRIM No. 1702.

We have no idea why trial counsel made the choices which were made here. The record is silent. As our high court observed, it is often difficult on appeal to apply ineffective assistance of counsel analysis to a silent record. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.) Trial counsel objected to giving any aiding and abetting instruction because the case had not been tried on such theory. Having been unsuccessful with that strategy, counsel sought to have the jury instructed on the theory that Thurman was actually an accessory after the fact under section 32. The record does not reveal trial counsel's reasoning for failing to specifically challenge the instruction at issue here. Thurman has not established either element of the *Strickland* test.

DISPOSITION

The judgment is affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

O'ROURKE, J.

IRION, J.